Filed 4/30/19 In re Jaden P. CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

In re JADEN P. et al., Persons Coming Under the Juvenile Court Law.	B289592
DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. NATASHA D., Defendant and Appellant.	(Los Angeles County Super. Ct. No. 17LJJP00028B—C)

APPEAL from an order of the Superior Court of Los Angeles County, Stephen E. Ipson, Commissioner. Conditionally affirmed with directions.

Jack A. Love, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel and Jessica S. Mitchell, Deputy County Counsel for Plaintiff and Respondent.

In this appeal from a dispositional order of the juvenile court, Natasha D. (mother) urges that (1) the juvenile court's finding that her children, Jaden P. and Randall P., Jr., could not safely remain in mother's care was unsupported by substantial evidence, and (2) the juvenile court did not comply with the Indian Child Welfare Act (ICWA) (25 U.S.C. §§ 1901 et seq.; Welf. & Inst. Code, §§ 224–224.3).[1] We remand the matter to allow the juvenile court to comply with ICWA, and otherwise conditionally affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Mother has three children: M.M. (born in Sep. 2007), Jaden (born in July 2010), and Randall (born in Sep. 2011). Randall P., Sr. (father) is Jaden's and Randall's father, and Martin M. (Martin) is M.M.'s father. This appeal concerns only Jaden and Randall.

A. Prior Referrals

In 2012, the Los Angeles County Department of Children and Family Services (DCFS) investigated a report that mother and father were heavy methamphetamine users and were living with the children in a filthy home. A petition was filed, but it was dismissed after the family relocated to Texas.

In 2013, Child Protective Services in Fort Worth, Texas (Fort Worth CPS) received three referrals related to mother's drug use. A case was closed in 2014 after mother completed a parenting class, counseling, and random drug testing.

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[1] All subsequent undesignated statutory references are to the Welfare and Institutions Code.

B. Present Referral and Investigation

In September 2017, mother reported to law enforcement that she had discovered photographs of Martin sexually abusing M.M. Martin was arrested and convicted of sexual abuse of a minor; he currently is serving a sentence of 18 years to life.

DCFS interviewed mother, who admitted smoking marijuana and disciplining the children by hitting them with her hand, a belt, and a wooden spoon. Mother's child care provider was her roommate, Melyssa C., who had a criminal and substance abuse history. Mother believed father was serving a state prison sentence in Texas. Both boys were reported to be having significant difficulties at school.

C. Petition

In September 2017, DCFS filed a petition alleging jurisdiction over the children pursuant to section 300, subdivisions (a), (b), (d), and (j). The petition alleged that Martin sexually abused M.M., and that mother struck the children with a belt, a spoon, and her hands, was a current user of marijuana, and allowed Melyssa, who abused marijuana and alcohol, to live in the home and have access to the children.

At the September 14, 2017 detention hearing, the court found a prima facie case for finding the children within the court's jurisdiction. The court ordered the children released to mother, but admonished her that she was required to drug test weekly and to remain sober, and that she could not physically discipline the children or remove them from Southern California without court permission. M.M. was referred for individual counseling, and the boys were ordered to be assessed for Regional Center services and for Individualized Education Plans (IEPs).

D. Jurisdiction and Disposition

In December 2017, DCFS reported that M.M. had not yet begun counseling. Mother blamed M.M.'s therapist for canceling appointments, but the therapist told the social worker that mother and M.M. repeatedly missed appointments without notice.

At the December 4, 2017 jurisdiction hearing, mother pled no contest to count b-2 of the petition (physical abuse of Randall), and the court dismissed the remaining counts concerning mother. The court ordered mother to submit to three on-demand drug tests and to enroll M.M. in therapy, and it ordered DCFS to provide the family with family preservation or wraparound services.[2]

E. Mother's and Father's Removal of the Children from California

In December 2017, mother reported that Randall, then age six, had been exhibiting behavioral issues at home and at school, and had been suspended from school twice. Mother said she was overwhelmed with Randall's defiant behavior and felt unable to address it. She believed Randall was acting out due to the lack of a father figure, and she asked to send Randall to live with father in Texas. DCFS spoke to father, who said he was living with the

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[2] Los Angeles County's wraparound services program is a "needs-based planning process for children and youth with high level mental health and/or urgent mental health needs." DCFS contracts with wraparound service providers to provide support to children and youth who have "urgent and/or intensive mental health needs that cause impairment at school, at home, or in the community." (<http://policy.dcfs.lacounty.gov/content/Wraparound_Approach.htm> [as of Apr. 30, 2019].)

paternal grandparents and was willing to have Randall placed with him. DCFS asked the court to order an ICPC (Interstate Compact on the Placement of Children) assessment of father's home; the court did so.

In February 2018, DCFS learned that in late January, without DCFS's or the court's knowledge or permission, mother had sent Jaden and Randall to live with father in Texas. Mother told DCFS she was frustrated with the boys' ongoing behavioral problems and was tired of waiting for the court to authorize the move. She said she had been unable to control Jaden without using corporal punishment. Mother told the CSW: " 'Because you guys are involved, I can't even spank my children and now they don't listen to me. I've tried everything and nothing works. I just don't know what else to do.' "

Fort Worth CPS visited the children in paternal grandmother's home and observed no safety hazards. However, father had a criminal history and recently had been incarcerated for 12 months for violating his parole. He refused to communicate with DCFS or take the children to be assessed by their local CPS office.

On February 12, mother told the CSW that the boys would not be returning to California, saying, " 'You guys took my right away to spank my kids and they weren't listening to me. I didn't have control over them. They're doing great now with their father. All they needed was a father figure in their life and they are not having any more behavioral issues with him at all.' "

F. Issuance of Protective Custody Warrant

In early March 2018, DCFS reported that the boys were continuing to exhibit significant behavioral problems at school. In California, the boys' elementary school had reported that in

2017 and 2018, seven-year-old Jaden frequently hit, kicked, and pushed other children, and six-year-old Randall screamed and climbed on furniture, threw toys, stole books, hit and pinched other children, and brought razor blades to class. The boys' Texas elementary school described similar behavior. In a two-week period in February 2018, the school reported at least six separate incidents in which Jaden hit, punched, or threatened other students, as well as one in which he "plucked a butterfly/moth off a student's shirt and tore it to pieces in front of this student with no remorse." Randall reportedly hit students on his school bus and had emotional outbursts at school. On February 27, Jaden was suspended from school after multiple incidents of violence and bullying; the following day, Randall had to be removed from his classroom after he threatened classmates with scissors and pretended to shoot them with a gun.

The boys reported that Jaden was living with a woman named Nickie, and Randall was living with the paternal grandmother, but was being cared for by a teenage cousin until grandmother got home from work at 11:00 p.m. Both children reported that Randall had been taken to the hospital after he smashed his finger in a car door. The boys told school personnel that they did not like living in Texas and wanted to return home to mother.

On March 7, 2018, the juvenile court issued a protective custody warrant for the children. The children were returned to California and placed in a foster home.

G. Supplemental Petition; Jurisdiction/Disposition Hearing

On March 16, 2018, DCFS filed a supplemental dependency petition under section 387, which alleged that mother had

violated the court's orders by allowing the children to reside with father in Texas.

In April 2018, DCFS reported that it recently had terminated mother's visit with the boys because mother was preoccupied with her cell phone. Jaden's tantrums had escalated, and mother told him: " 'You have to stop this! This is one of the reasons why you guys got taken away! You can't keep acting like this!' " Randall tried to choke himself with both hands to get mother's attention while she was occupied with her phone. DCFS told the court it was concerned about mother's lack of understanding of the children's mental health needs, as well as her tendency to "place blame on the children for their inability to control their negative outbursts and behaviors. Mother has yet to acknowledge and understand that the priority at this time is for the children to receive the appropriate mental health services."

DCFS also reported that Randall had threatened to kill his foster parents and his brother, and that Jaden was afraid of Randall and asked that Randall be placed in a different foster home because " '[h]e's going to mess up everything and I like it here.' " DCFS reported that the agency and foster parents were taking the children to multiple therapy sessions weekly and were working hard to stabilize them.

On April 9, 2018, the court sustained the supplemental allegation of the petition. On April 19 and 20, it found by clear and convincing evidence that the children would be at substantial risk if they were returned home, and there were no reasonable means by which the children's physical and emotional health could be protected without removing them from the parents' custody. The court therefore ordered the children to remain in

foster care, and ordered DCFS to provide mother with family reunification services.

Mother timely appealed from the dispositional order.

DISCUSSION

Mother contends that (1) substantial evidence does not support the juvenile court's order removing the children from her physical custody, and (2) DCFS failed to give ICWA notice, and the juvenile court failed to make ICWA findings. We consider these issues below.

I.
Substantial Evidence Supported the Juvenile Court's Removal Order

Mother contends the juvenile court erred in removing the children from her physical custody because the evidence did not support a removal finding under section 361, subdivision (c) (section 361(c)). For the reasons that follow, mother's contention is without merit.

A. Legal Standards

Section 361(c) permits the removal of a child from the physical custody of his or her parents "with whom the child resides at the time the petition is initiated" if the juvenile court finds by clear and convincing evidence that there "is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's . . . physical custody." (§ 361(c)(1).)

"A removal order is proper if based on proof of parental inability to provide proper care for the child and proof of a

potential detriment to the child if he or she remains with the parent. [Citation.] 'The parent need not be dangerous and the minor need not have been actually harmed before removal is appropriate. The focus of the statute is on averting harm to the child.' [Citation.] The court may consider a parent's past conduct as well as present circumstances. [Citation.]" (*In re N.M.* (2011) 197 Cal.App.4th 159, 169–170.)

On appeal, we review a removal order for substantial evidence. (*In re Alexzander C.* (2017) 18 Cal.App.5th 438, 446.) We do not reweigh the evidence or express an independent judgment, but instead determine "whether 'a reasonable trier of fact could have found for the respondent based on the whole record.' " (*Ibid.*)

B. Analysis

Mother contends the court erred in removing the children from her physical custody, urging there was not substantial evidence to support a finding under section 361(c). Specifically, mother urges the record does not support findings that (1) the children would have been in substantial danger had they been returned home, and (2) there were no reasonable means to protect the children without removing them from mother's physical custody.

We note as an initial matter that, under the facts of this case, section 361(c) does not appear to govern mother's right to physical custody of the children. As we have indicated, section 361(c) governs removal of dependent children from the physical custody of the parents "*with whom the child resides* at the time the petition was initiated." (Italics added.) Here, the children were in the physical custody of *father*, not of mother, when DCFS filed the section 387 petition in March 2018.

Accordingly, section 361(c) does not appear to govern mother's rights to physical custody of the children.

In any event, even if mother's challenge to the disposition order is governed by section 361(c), it nonetheless fails. Mother urges that the children could have been adequately protected in her custody because her decision to allow them to live with father did not place them in danger, and although "she was initially reluctant to accept in home services earlier in the case, she had wraparound services in place at the time of the disposition hearing on the section 387 petition." Substantial evidence supported the juvenile court's contrary conclusion. As we have described, the juvenile court initially permitted the children to remain in mother's custody under DCFS supervision, and it offered the family wraparound services to support mother in dealing with the children's behavioral challenges. Instead of taking advantage of the services offered to her, mother sent the children out of Los Angeles County, where DCFS could not provide the children services or effectively supervise them. Nor was this the first time mother removed the children from California to avoid court supervision: As DCFS notes, mother and father had earlier moved with the children from California to Texas after DCFS filed a juvenile dependency petition in 2012. Accordingly, the juvenile court could reasonably have concluded that had the children been returned to mother, she might once again leave Los Angeles County to avoid DCFS and court supervision.

There was also substantial evidence to support the conclusion that had the children been returned to mother's custody, they would not have received the services they needed. The record is replete with evidence that the children, who were

six- and seven-years-old when the petition was filed, had significant mental health needs that mother was unable or unwilling to address. Both children resisted following home and school rules, behaved violently with other children, and, as a result, were regularly subject to school discipline, including suspension. Among other things, six-year-old Randall reportedly brought razor blades to school and threatened classmates with scissors, and seven-year-old Jaden physically attacked and threatened other students and tortured an insect in front of classmates. Notwithstanding these and similar episodes, during the four-month period the children were in mother's custody under DCFS supervision in 2017, mother declined services and failed to enroll the children in counseling, telling her social worker that "all the boys needed" was a father figure in their lives. Under these circumstances, it was well within the court's discretion to conclude that the children could not be adequately protected in mother's custody.

Mother concedes that she initially resisted mental health services for the children, but she contends that detention was unnecessary because "she testified she had services in place now and understood the importance of having those services in place to help her family." But the juvenile court was not required to credit this testimony, especially in light of mother's history of untruthfulness. (See, e.g., *T.W. v. Superior Court* (2012) 203 Cal.App.4th 30, 47 [appellate court must "defer to the juvenile court's findings of fact and assessment of the credibility of witnesses"]; *In re Jordan R.* (2012) 205 Cal.App.4th 111, 135 [in reviewing jurisdiction findings, the appellate court "do[es] not reweigh the evidence, evaluate the credibility of witnesses or

resolve evidentiary conflicts"].) We conclude that substantial evidence supports the court's removal finding.

II.
The Trial Court Erred in Failing to Make an ICWA Finding

Mother urges we must reverse the dispositional order for a second, independent reason: DCFS failed to conduct an adequate investigation into the children's possible Indian ancestry, and the juvenile court failed to make the findings required by ICWA. DCFS concedes ICWA error, but it asserts that the proper remedy is a limited remand directing it to give proper notice and directing the juvenile court to make ICWA findings.

A. Additional Facts Relevant to ICWA

At the September 14, 2017 detention hearing, mother said she might have some Cherokee ancestry through her maternal grandfather, who was deceased. The court ordered DCFS to investigate and to give notice to the Cherokee tribes and the Bureau of Indian Affairs (BIA). Thereafter, in a November 2017 report, DCFS stated it had sent ICWA notices to the Cherokee tribes, and such notices were "attached to this report." However, the copy of the report included in the appellate record does not include the attached notices. Subsequently, in April 2018, DCFS advised the court that it had not received responses from the tribes, and it therefore would resend the ICWA notices. The juvenile court did not thereafter make the findings mandated by ICWA; instead, it erroneously stated on March 16, 2018, that ICWA issues "have been handled, so there's no need to revisit those issues."

B. Applicable Law

ICWA was enacted "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs." (25 U.S.C. § 1902.)

To that end, specific notice requirements are triggered when the juvenile court "knows or has reason to know that an Indian child is involved" in a dependency proceeding. (§§ 224.2–224.3; 25 U.S.C. § 1912(a).) " 'Notice is a key component of the congressional goal to protect and preserve Indian tribes and Indian families. Notice ensures the tribe will be afforded the opportunity to assert its rights under the Act irrespective of the position of the parents, Indian custodian or state agencies. Specifically, the tribe has the right to obtain jurisdiction over the proceedings by transfer to the tribal court or may intervene in the state court proceedings. Without notice, these important rights granted by the Act would become meaningless.' (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1421.)" (*In re Charlotte V.* (2016) 6 Cal.App.5th 51, 56 (*Charlotte V.*).)

The juvenile court must determine whether proper notice was given under ICWA, and whether ICWA applies to the proceedings. We review the trial court's findings for substantial evidence. (*Charlotte V.*, *supra*, 6 Cal.App.5th at p. 57.)

C. A Limited Remand Is Necessary for Proper ICWA Notice and Findings

Both mother and the County assert that remand is appropriate to permit DCFS to provide notice to the Cherokee tribes, the Bureau of Indian Affairs, and the Secretary of the Interior, and to allow the juvenile court to make an ICWA finding. We agree. The record before us does not establish either that DCFS gave proper ICWA notice or that the juvenile court made the findings required by statute. We therefore conclude that remand is necessary.

We further conclude that the proper remedy in this case is to "leave the juvenile court's orders in place and effect a 'limited remand' to effect compliance with the ICWA." (*In re Veronica G.* (2007) 157 Cal.App.4th 179, 187; see also *In re Brooke C.* (2005) 127 Cal.App.4th 377, 385 [proper remedy is a "limited remand to the juvenile court for the Department to comply with the notice requirements of the ICWA, with directions to the juvenile court depending on the outcome of such notice."].) We therefore remand the matter to the juvenile court with directions (if it has not already done so) to direct DCFS to provide notice to the Cherokee tribes, the Bureau of Indian Affairs, and the Secretary of the Interior; and, thereafter, to determine whether Jaden and Randall are Indian children within the meaning of ICWA.

DISPOSITION

The dispositional order is conditionally affirmed, and the matter is remanded to the juvenile court with directions to comply with the inquiry and notice provisions of ICWA, if the court has not already done so. If, after proper inquiry and notice, it is determined that the children are Indian children and ICWA applies to these proceedings, the juvenile court shall conduct a new jurisdictional hearing.

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EDMON, P. J.

We concur:

EGERTON, J.

DHANIDINA, J.